Study N-300 April 7, 2000

Memorandum 2000-34

AB 1822 – Administrative Rulemaking

Assembly Bill 1822 (Wayne) would implement the Commission's recommendations regarding the administrative rulemaking process. Originally, the bill was set to be heard on March 28, 2000, in the Assembly Consumer Protection, Governmental Efficiency, and Economic Development Committee. Shortly before the hearing date, the Western States Petroleum Association (WSPA) contacted the author's office to express concerns about some of the bill's provisions. At its request, the bill was taken off the committee calendar and rescheduled to be heard on April 11, 2000. It was hoped that this would provide sufficient time to resolve WSPA's concerns. The remainder of this memorandum discusses the results of the staff's meeting with WSPA and other interested groups.

The staff will report the results of the April 11 hearing at the Commission's next meeting, either orally or in a supplement to this memorandum.

All statutory references in this memorandum are to the Government Code.

MEETING WITH INTERESTED GROUPS

On March 31, the staff met with WSPA and other interested groups to discuss AB 1822. In attendance at the meeting were Eloy Garcia and David Arrieta (representing WSPA), Jeff Sickenger (representing the California Manufacturer's Association), John M. Hunter (representing the American Electronics Association), Tam Polland (representing Equiva), Minnie Tsunezumi and Greg Meisinger (representing Equilon), Cindy Tuck (representing Californian Council for Environmental and Economic Balance), Jamie Morgan (of Assembly Member Wayne's staff), Herbert Bolz (of the Office of Administrative Law), and Brian Hebert (representing the Commission). The meeting was quite constructive and consensus was reached on nearly all the points that were raised.

Amendments have been submitted to implement the decisions made at the meeting. Because Assembly Member Wayne is both the author and the Commission's current chair, his concurrence in the amendments satisfied our

practice of discussing proposed amendments with the chair or vice-chair before they are made, whenever possible. A draft of revised Comments to the Commission's rulemaking recommendations is attached for the Commission's approval. The concerns raised at the meeting are discussed below.

PRELIMINARY AGENCY DETERMINATIONS

All of the private sector groups represented expressed concern about the replacement of the terms "determination" and "finding" with the term "belief" in Sections 11346.2 and 11346.5. Relevant portions of these provisions are set out below (with the terms "belief" and "believes" in bold type):

> **§ 11346.2. Notification of Office of Administrative Law**
>
> …
>
> (b) An initial statement of reasons for proposing the adoption, amendment, or repeal of a regulation. This statement of reasons shall include, but not be limited to, all of the following:
>
> …
>
> (4) Facts, evidence, documents, testimony, or other evidence that the agency **believes** may support a finding that the action will not have a significant adverse economic impact on business.
>
> **§ 11346.5. Notice contents**
>
> (a) The notice of proposed adoption, amendment, or repeal of a regulation shall include the following:
>
> …
>
> (7) If a state agency, in proposing to adopt, amend, or repeal any administrative regulation, **believes** that the action may have a significant adverse economic impact on business, including the ability of California businesses to compete with businesses in other states, it shall include the following information in the notice of proposed action:
>
> …
>
> (C) The following statement: "The (name of agency) **believes** that the (adoption/amendment) of this regulation may have a significant adverse economic impact on businesses, including the ability of California businesses to compete with businesses in other states. The (name of agency) (has/has not) considered proposed alternatives that would lessen any adverse economic impact on business and invites you to submit proposals. Submissions may include the following considerations:
>
> …
>
> (8) If a state agency, in adopting, amending, or repealing any administrative regulation, **believes** that the action will not have a

> significant adverse economic impact on business, including the ability of California businesses to compete with businesses in other states, it shall make a declaration to that effect in the notice of proposed action. In making this declaration, the agency shall provide in the record facts, evidence, documents, testimony, or other evidence upon which the agency relies to support that **belief**.
>
> An agency's **belief** and declaration that a proposed adoption, amendment, or repeal of a regulation may have or will not have a significant, adverse impact on businesses, including the ability of California businesses to compete with businesses in other states, shall not be grounds for the office to refuse to publish the notice of proposed action.
>
> …
>
> (12) A statement that the action would have a significant effect on housing costs, if a state agency, in adopting, amending, or repealing any administrative regulation, **believes** that the action would have that effect. In addition, the agency officer designated in paragraph (14), shall make available to the public, upon request, the agency's evaluation, if any, of the effect of the proposed regulatory action on housing costs.

The groups represented at the meeting feel that the changes would give agencies too much discretion to proceed with rulemaking based only on their belief that rulemaking is appropriate. Similar concerns were also expressed by the Association of California Water Agencies, and by the committee consultant who analyzed AB 1822.

The staff explained that these changes were intended to make it clear that agency determinations made before the receipt of public comment on a proposed rulemaking were necessarily preliminary, as the agency does not yet have all of the facts. The groups represented at the meeting accepted that this was a proper purpose but remained opposed to the term "belief." The staff circulated alternative language, which uses the term "initial determination" in place of "belief." The proposed language is set out below:

> **§ 11346.2. Notification of Office of Administrative Law**
>
> …
>
> (b) An initial statement of reasons for proposing the adoption, amendment, or repeal of a regulation. This statement of reasons shall include, but not be limited to, all of the following:
>
> …
>
> (4) Facts, evidence, documents, testimony, or other evidence ~~that the agency believes may support a finding~~ <u>on which the</u>

agency relies to support an initial determination that the action will not have a significant adverse economic impact on business.

§ 11346.5. Notice contents

(a) The notice of proposed adoption, amendment, or repeal of a regulation shall include the following:

…

(7) If a state agency, in proposing to adopt, amend, or repeal any administrative regulation, ~~believes~~ makes an initial determination that the action may have a significant adverse economic impact on business, including the ability of California businesses to compete with businesses in other states, it shall include the following information in the notice of proposed action:

…

(8) If a state agency, in adopting, amending, or repealing any administrative regulation, ~~believes~~ makes an initial determination that the action will not have a significant adverse economic impact on business, including the ability of California businesses to compete with businesses in other states, it shall make a declaration to that effect in the notice of proposed action. In making this declaration, the agency shall provide in the record facts, evidence, documents, testimony, or other evidence upon which the agency relies to support that belief.

An agency's belief and declaration that a proposed adoption, amendment, or repeal of a regulation may have or will not have a significant, adverse impact on businesses, including the ability of California businesses to compete with businesses in other states, shall not be grounds for the office to refuse to publish the notice of proposed action.

…

(12) A statement that the action would have a significant effect on housing costs, if a state agency, in adopting, amending, or repealing any administrative regulation, ~~believes~~ makes an initial determination that the action would have that effect. In addition, the agency officer designated in paragraph (14), shall make available to the public, upon request, the agency's evaluation, if any, of the effect of the proposed regulatory action on housing costs.

The consensus was that this would be a significant improvement. WSPA reviewed the language after the meeting and indicated that it was acceptable. **The proposed language was submitted as an amendment.**

Unfortunately, in the hurry to meet the amendment deadline for the April 11, hearing, the staff inadvertently omitted three changes that should have been

included. These changes are set out below, with strikeout and underscore to indicate changes from the just-amended text:

> **§ 11346.5. Notice contents**
>
> (a) The notice of proposed adoption, amendment, or repeal of a regulation shall include the following:
>
> …
>
> (7) If a state agency, in proposing to adopt, amend, or repeal any administrative regulation, makes an initial determination that the action may have a significant adverse economic impact on business, including the ability of California businesses to compete with businesses in other states, it shall include the following information in the notice of proposed action:
>
> …
>
> (C) The following statement: "The (name of agency) ~~believes~~ has made an initial determination that the (adoption/amendment) of this regulation may have a significant adverse economic impact on businesses, including the ability of California businesses to compete with businesses in other states. The (name of agency) (has/has not) considered proposed alternatives that would lessen any adverse economic impact on business and invites you to submit proposals. Submissions may include the following considerations:
>
> …
>
> (8) If a state agency, in adopting, amending, or repealing any administrative regulation, makes an initial determination that the action will not have a significant adverse economic impact on business, including the ability of California businesses to compete with businesses in other states, it shall make a declaration to that effect in the notice of proposed action. In making this declaration, the agency shall provide in the record facts, evidence, documents, testimony, or other evidence upon which the agency relies to support ~~that belief~~ its initial determination.
>
> An agency's ~~belief~~ initial determination and declaration that a proposed adoption, amendment, or repeal of a regulation may have or will not have a significant, adverse impact on businesses, including the ability of California businesses to compete with businesses in other states, shall not be grounds for the office to refuse to publish the notice of proposed action.

The omission of these changes has been pointed out to the author's office, WSPA, and the committee consultant. **These changes are proposed as technical committee amendments.**

NECESSITY STANDARD

The private sector groups represented at the meeting expressed significant concern about the proposed change to the evidentiary basis for demonstrating the necessity of a regulation.

Under existing Section 11349(a), every proposed regulation must be shown to be necessary, by substantial evidence in the rulemaking record. An implementing regulation provides that an agency explanation of the necessity of a regulation that "is based upon policies, conclusions, speculation, or conjecture" must be supported with "facts, studies, expert opinion, or other information." 1 Cal. Code Regs. § 10(b)(2).

The Commission recommended that the following language be added to Section 11349(a):

> Where the need for a regulation is based on policy judgments and cannot, as a practical matter, be demonstrated by facts or expert opinion, a statement of the adopting agency's rationale for the necessity of the regulation shall be considered substantial evidence. An agency that relies solely on a statement of its rationale for the necessity of the regulation under this subdivision shall explain why the necessity of the regulation cannot, as a practical matter, be demonstrated by facts or expert opinion.

This would permit an agency to rely exclusively on its policy rationale for the necessity of a regulation, where facts supporting the need for the regulation are unavailable as a practical matter. For example, if an agency proposes a regulation requiring that employees of state-regulated child-care centers be trained in CPR, the agency may not be able to produce facts showing that the rule would reduce infant mortality. Arguably, it would not be reasonable to require that the agency undertake a factual study before implementing this apparently sensible rule. As a matter of current practice, the Office of Administrative Law accepts policy explanations, without factual support, for unopposed common-sense rules. Our change would ratify and regulate that practice.

The represented groups felt that the change would permit agencies to proceed without factual support for the need of a regulation in cases where factual support clearly should be required. For example, if the Department of Toxic Substances Control proposes a regulation classifying a certain material as hazardous, it should be required to produce scientific factual support for its conclusion. The fact that such data may not be readily available should not justify

proceeding without it. The staff was persuaded that this is a serious defect in the bill and proposed a number of possible alternatives. None of these alternatives were acceptable to the represented groups, who indicated that they would oppose the bill unless the objectionable provision is removed. **Because of significant technical problems with the provision, and the likelihood that the provision would lead to substantial political opposition to the bill, the staff agreed to delete it.**

RECORD OF REVIEW IN DECLARATORY RELIEF PROCEEDING

Section 11350(d) was added to correct technical defects in the provision limiting the record of review in a declarative relief proceeding to determine the validity of a regulation. An ambiguity in proposed Section 11350(d)(4) was pointed out at the meeting. That paragraph was added to permit consideration of evidence showing that an agency is using a regulation that should have been adopted under the rulemaking procedure, but was not (an "underground regulation"):

> (4) Any evidence relevant to whether a regulation used by an agency should have been adopted under this chapter.

Out of context, the phrase "should have been" can be misread. For example, an opponent to a properly adopted rule might argue that the provision permits introduction of evidence showing that the rule "should not have been adopted" at all. **The provision has been amended to eliminate that ambiguity, as follows:**

> (4) Any evidence relevant to whether a regulation used by an agency ~~should have been~~ is required to be adopted under this chapter.

DEFINITION OF STATE AGENCY

AB 1822 amends Section 11346.3(b)(2) to eliminate a redundant subdivision-specific definition of "state agency." There is a general definition of "state agency" that applies to Section 11346.3. See Section 11000. Minnie Tsunezumi expressed concern that we might be changing the meaning of Section 11346.3(b) by deleting the language, because the deleted definition differs slightly from the general definition. In relevant part, Section 11000 provides:

> As used in this title, "state agency" includes every state office, officer, department, division, bureau, board, and commission.

In relevant part, the deleted language provides (emphasis added):

> For purposes of this subdivision, "state agency" shall include every state office, officer, department, division, bureau, board, and commission, *whether created by the Constitution, statute, or initiative*…

The staff indicated that the phrase "whether created by the Constitution, statute, or initiative" appeared to be surplus, and that there was no intention to change the substance of Section 11346.3(b). The Commission's Comment stating that the change was nonsubstantive was also pointed out. Nonetheless, Ms. Tsunezumi remained concerned, and the staff promised to do additional research on the matter.

After further consideration, the staff is confident that the change would be nonsubstantive. There is nothing suggesting that Section 11000 does not apply to agencies created by the Constitution (the principal concern expressed at the meeting). To the contrary, there is case law holding that Section 11000 applies to the University of California, a constitutionally-created agency. See *Ishimatsu v. Regents of University of California*, 266 Cal. App. 2d 85 (1968). If the deleted language were broader than the general definition, then only Section 11346.3(b), out of the entire chapter, would apply to constitutionally-created agencies. It seems very unlikely that the Legislature intended such a result.

Another possible reading of the deleted phrase is that it excludes agencies that are created by means other than the Constitution, a statute, or initiative. For example, an agency created by Governor's Reorganization Plan (such as Cal-EPA). Under this reading, every provision of the rulemaking chapter *except* Section 11346.3(b) would apply to such agencies. Again, it seems unlikely that this was intended by the Legislature.

The staff recommends against making any change to the bill on this point. The staff's position was explained to Ms. Tsunezumi. She intends to have her legal staff investigate the question further. The staff is happy to continue working with her and her staff to resolve the matter.

REPETITIVE AND IRRELEVANT COMMENTS

AB 1822 would amend Section 11346.9(a)(3) to ratify the existing agency practice of aggregating responses to repetitive comments and summarily

dismissing irrelevant comments. Concern was expressed that agencies might improperly aggregate dissimilar comments or might summarily dismiss a substantive comment, simple because the agency finds it "irrelevant." **The staff agreed to clarify the meaning of "irrelevant" by amending Section 11346.9(a)(3) as follows:**

> The agency may aggregate and summarize repetitive or irrelevant comments as a group, and may respond to repetitive comments or summarily dismiss irrelevant comments as a group. For the purposes of this paragraph, a comment is "irrelevant" if it is not directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action.

This parallels existing language in the same section that limits an agency's responsibility to respond to public comments.

The staff also agreed to add the following Comment language:

> The Office of Administrative Law may disapprove a proposed regulation if an agency improperly aggregates dissimilar comments or summarily dismisses a relevant comment. See Section 11349.3 (office may disapprove regulation for failure to comply with this chapter).

This simply notes the existing authority of the Office of Administrative Law to disapprove a regulation for failure to follow required procedures.

SMALL BUSINESS PROVISIONS

Section 11346.2(b)(4)(B) requires an agency to describe "alternatives the agency has identified that would lessen any adverse impact on small business." Section 11346.9(a)(5) requires an agency to explain "the reasons for rejecting any proposed alternatives that would lessen the adverse economic impact on small businesses." The Commission originally recommended that these provisions be generalized, to require consideration of alternatives that would lessen adverse economic effects on "business" rather than on "small business." Objections were raised that this would diminish the special emphasis currently placed on small business impacts. Consequently, the bill was amended to restore existing law on this point. The groups represented at the meeting were disappointed in the change. They felt that agencies should be required to consider alternatives that would lessen adverse effects on "business" and "small business" both, as separate analyses. The staff agreed to consider this suggestion.

After discussing the matter internally and with the author's staff, the staff concluded that such a change should not be made. There is a significant likelihood that agencies would find the additional analysis to be unduly burdensome and would oppose the bill. Another pending bill, AB 2439 (Wright) is specifically focused on enhancing the analysis of adverse effects on business in the rulemaking process. That bill would probably be a better vehicle for the expansion of required analyses proposed by the represented groups. The staff does not expect that this decision will result in any opposition to the bill.

TECHNICAL AMENDMENT REQUESTED BY OAL

The Office of Administrative Law (OAL) has requested a technical amendment to Section 11346.1(h). This nonsubstantive suggestion was not discussed at the March 31 meeting.

AB 1822 amends Section 11346.1(h) in order to clarify its meaning without changing its substance. The following changes from existing law would be made:

> (h) ~~A regulation originally adopted as an emergency regulation, or an emergency regulation substantially equivalent thereto that is readopted as an emergency regulation, shall not be filed with the Secretary of State as an emergency regulation except with the express prior approval of the director of the office.~~ Except with the express prior approval of the director, an agency shall not adopt an emergency regulation that is substantially equivalent to an emergency regulation previously adopted by that agency. If the agency proposes the adoption of an emergency regulation that is substantially equivalent to a previously adopted emergency regulation and the director does not expressly approve adoption of the emergency regulation, the office shall not file the emergency regulation with the Secretary of State.

OAL objects that this language implies that an agency must receive OAL's permission before *submitting* a proposed readoption of an emergency rulemaking. This is inconsistent with existing practice, whereby an agency may submit a proposed readoption, but OAL will not forward it to the Secretary of State if it does not approve the readoption.

The staff proposed alternative language to better conform to the existing practice:

> (h) The office shall not file an emergency regulation with the Secretary of State if the emergency regulation is the same as or

> substantially equivalent to an emergency regulation previously adopted by that agency, unless the director expressly approves the agency's readoption of the emergency regulation.

This language was acceptable to OAL and has been amended into the bill. The change should be noncontroversial.

CONCLUSION

If the Commission concurs in the decisions made by staff, in consultation with the author and chair, the Commission should approve those decisions and the attached revised Comments.

Respectfully submitted,

Brian Hebert
Staff Counsel

April 7, 2000

DRAFT REPORT OF THE CALIFORNIA LAW REVISION COMMISSION ON ASSEMBLY BILL 1822

Assembly Bill 1822, authored by Assembly Member Howard Wayne, implements two California Law Revision Commission recommendations: *Administrative Rulemaking*, 29 Cal. L. Revision Comm'n Reports 459 (1999), and *Improving Access to Rulemaking Information*, 30 Cal. L. Revision Comm'n Reports ___ (2000). The revised Comments set out below supersede the comparable Comments in the recommendations and reflect amendments to the bill made during the legislative process.

Gov't Code § 11346.2 (amended). Notification of Office of Administrative Law

Comment. Subdivision (a)(1) of Section 11346.2 is a specific application of Section 6215(a) (state agency "shall write each document which it produces in plain, straightforward language, avoiding technical terms as much as possible, and using a coherent and easily readable style"). The requirement that a regulation be written in plain English has been expanded to include all regulations and not just those that affect small business. Plain English means language that satisfies the clarity standard expressed in Section 11349. See Section 11342.580 ("plain English" defined). Note that the former provision requiring the preparation of a plain English summary of a proposed regulation affecting small businesses, where the regulation cannot be drafted in plain English, has been broadened to apply to all regulations and continued in Section 11346.5(a)(3)(B). See Sections 11342.580 ("plain English" defined), 11349(c) (clarity standard).

Former subdivision (b)(1) (description of problem addressed) is deleted as unnecessary; the same information is required by former subdivision (b)(2) (statement of purpose for proposed action).

~~Former subdivision (b)(4)(B) has been amended to require that an agency describe alternatives that would lessen adverse impacts on any business, not just on a small business.~~

Former subdivision (b)(5) is revised to eliminate the implication that ~~formal findings~~ a final finding is required before the agency has received comment on a proposed action.

Gov't Code § 11346.5 (amended). Notice contents

Comment. Subdivision (a)(3)(B) of Section 11346.5 is amended to broaden the plain English policy statement requirement to apply to all proposed actions, and not just those affecting small business. The informative digest is also expanded to include a plain English summary of the regulation. See Sections 11342.580 ("plain English" defined), 11349(c) (clarity standard).

Paragraphs (7)-(8) and former ~~subdivision (a)~~ paragraph (11) of subdivision (a) are amended to make clear that ~~formal~~ final findings are not required before the agency has received comment on a proposed action. Paragraphs (7)-(8) are also amended to provide that those provisions apply to the repeal of a regulation, as well as the adoption, or amendment of a regulation.

Paragraph (11) is added to subdivision (a) to include a finding that it is necessary for the health, safety, or welfare of the people of the state that a regulation requiring a report apply to businesses. This implements Section 11346.3(c).

Gov't Code § 11346.9 (amended). Final statement of reasons and updated informative digest

Comment. Subdivision (a)(1) of Section 11346.9 is amended to refer to Section 11347.1, which codifies the existing procedure for providing an additional opportunity for public comment

in response to material added to the rulemaking file. See 1 Cal. Code Regs. § 45. Subdivision (a) requires additional public comment on certain material that is added to the rulemaking file after publication of the notice of proposed action. This is a broader requirement than that provided in Section 11346.8(d), which only requires an opportunity for additional comment regarding material that is added to the rulemaking file after the close of the public hearing or comment period. The broader requirement is consistent with existing practice.

Subdivision (a)(1)-(2) is also amended to make clear that those provisions apply to the repeal of a regulation as well as the adoption or amendment of a regulation.

Subdivision (a)(3) is amended to codify the existing practice of grouping repetitive comments and summarily dismissing irrelevant comments for purposes of this section. The Office of Administrative Law may disapprove a proposed regulation if an agency improperly aggregates dissimilar comments or summarily dismisses a relevant comment. See Section 11349.3 (office may disapprove regulation for failure to comply with this chapter).

~~Subdivision (a)(5) is amended to require an explanation for rejecting alternatives that would lessen the adverse economic impact on any business, not just a small business.~~

Subdivision (d) is added to authorize incorporation of a prior statement by reference. This reflects the fact that no purpose is served by requiring an agency to reiterate a statement that was made earlier in the rulemaking process. For example, where an agency determines pursuant to Section 11346.5(a)(6) that a proposed rule would not impose a cost on a local agency or school district and, at the time of preparing the final statement of reasons, determines that its prior determination is correct and complete, the agency may incorporate the statement made pursuant to Section 11346.5(a)(6) in complying with Section 11346.9(a)(2).

Gov't Code § 11349 (amended). Standards

Comment. Subdivision (a) of Section 11349 is amended to ~~make two changes~~:

~~(1) The meaning of "necessity" is clarified~~ clarify the meaning of "necessity," by placing it in the context of the purpose of the regulation. This is consistent with other provisions that relate to the necessity of a regulation. See Gov't Code §§ 11342.2 (regulation not valid unless "reasonably necessary to effectuate the purpose of statute" authorizing the regulation), 11350 (court may find regulation invalid if agency determination that the regulation "is reasonably necessary to effectuate the purpose of the statute, court decision, or other provision of law that is being implemented, interpreted, or made specific by the regulation" is not supported by substantial evidence). This is a nonsubstantive change.

~~(2) The evidentiary standard for demonstrating necessity has been revised in recognition of the fact that, in some cases, necessity cannot be factually demonstrated. In such a case, the agency must explain the need for the regulation and must also explain why it cannot provide facts to support its explanation. The adequacy of these explanations is subject to review by the Office of Administrative Law. See Section 11349.3 (OAL may disapprove proposed regulation for failure to comply with requirements of chapter).~~

Gov't Code § 11350 (amended). Judicial review of validity of regulation

Comment. Section 11350 is amended to provide for judicial review of an order of repeal, as well as a regulation. This is consistent with the provision authorizing review of an emergency order of repeal.

Subdivision (a) is also amended to eliminate an ambiguity regarding the statement an agency prepares on proposing an emergency regulation. This change is technical and is not intended to affect the meaning of the section.

Subdivision (d) is added to correct inadequacies in the former provision limiting the record of review to the rulemaking file. Subdivision (d)(1) restates part of the substance of the former second paragraph of Section 11350(b)(2), limiting the record of review to the rulemaking file prepared under Section 11347.3. Subdivision (d)(2) permits consideration of an agency statement prepared under Section 11346.1(b) (justifying emergency regulation). Such a statement is not part of a rulemaking file prepared under Section 11347.3. See Section 11346.1(a). Subdivision (d)(3)

permits consideration of a document that should have been included in the rulemaking file but was not, in order to prove its omission. Such evidence may be necessary to prove a substantial failure to follow required procedures. For example, an agency's failure to include a public comment in the rulemaking file may constitute a substantial failure to follow required procedures. See Section 11347.3(b)(6) (written public comments must be included in rulemaking file). Proof of such an omission requires consideration of the omitted item. Subdivision (d)(4) permits consideration of any relevant evidence for the purpose of determining whether a regulation used by an agency ~~should have been~~ is required to be adopted under this chapter — i.e., whether it is an invalid "underground regulation." See Section 11340.5 (issuance or use of regulation that has not been adopted is prohibited). Note that evidence offered to prove that an agency has used a regulation that ~~should have been~~ is required to be adopted under the rulemaking procedure will typically be documentary evidence, but a court may consider oral testimony in appropriate circumstances (e.g., to judge the credibility of an affiant or declarant).